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THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT: TIME FOR RECONSIDERATION

OSBORNE M. REYNOLDS, JR.*

Introduction

Congress passed the Federal Tort Claims Act in 1946 to provide a means by which the federal government could, like other employers, be held liable for the torts of its employees committed within the scope of employment. Prior to that time, relief against the United States in such situations could be obtained only through passage of a private bill by Congress. The Federal Tort Claims Act (the "Act") was designed to relieve Congress of the burden of such bills and to assure a fairer and more readily available means of relief to claimants.¹ Difficulty in the implementation of the Act soon surfaced, however, because of the statute's provision that the waiver of governmental immunity does not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."²

The leading case of *Dalehite v. United States*³ gave a broad reading to the "discretionary function exception." In that case, the United States Supreme Court indicated that the provision was intended to retain immunity in all situations involving formulation or execution of plans that were drawn at a high governmental level and that entailed the exercise of judgment.⁴ *Dalehite* pro-

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1. See Baer, *Suing Uncle Sam in Tort*, 26 N.C.L. REV. 119 (1948); Smith, *Claims Under the Federal Tort Claims Act*, 42 KAN. B.J. 25 (1973). See generally Comment, *The Federal Tort Claims Act*, 56 YALE L.J. 534 (1947). The Federal Tort Claims Act, as amended, can be found at 28 U.S.C. §§ 2671-2680 (1976). See also 28 U.S.C. § 1346(b) (1976) (United States as a defendant).

2. 28 U.S.C. § 2680(a) (1982). See Matthews, *Federal Tort Claims Act—The Proper Scope of the Discretionary Function Exception*, 6 AM. U.L. REV. 22 (1957). See generally Stromswold, *The Twilight Zone of the Federal Tort Claims Act*, 4 AM. U.L. REV. 41 (1955).

3. 346 U.S. 15 (1953).

4. *Id.* at 34-36. The case arose out of the Texas City, Texas, disaster of 1947, in which fires and explosions occurred after the federal government had loaded ships with fertilizer, which contained combustible material. The fertilizer was being loaded for export to foreign countries as part of the nation's foreign aid program. Negligence was alleged in the adoption of the plan to export the fertilizer and in the manufacture, handling, labeling, and loading of the fertilizer, as well as in the government's failure to police the loading and fight the fire. Relief was eventually granted the disaster victims by means of a special bill through Congress; the relief was extended only to victims who were parties to the *Dalehite* suit. Act of Aug. 12, 1955, Pub. L. No. 84-378, 69 Stat. 707. See Comment, *Federal Tort Claims Act: A More Liberal Approach Indicated*, 22 MO. L. REV. 48 (1957).

duced considerable adverse comment from scholars;⁵ and the Court, in the subsequent cases of *Indian Towing v. United States*⁶ and *Rayonier v. United States*⁷ appeared to adopt a more limited reading of the exception. The modified interpretation immunized from liability only decisions and actions that themselves involved "planning" or "policy-making," not the "operational" details of executing policies.⁸ This planning v. operational level distinction was applied in numerous decisions by lower federal courts.⁹

Twenty years ago, the distinction appeared to be a widely accepted compromise between the extremes of ignoring the exception, on the one hand, or, on the other hand, letting the exception swallow the Act. At that time, this author endorsed that compromise,¹⁰ though the compromise had its

5. See Note, *Torts—Supreme Court Extends Immunity for Discretionary Function to Government Manufacturing*, 3 BUFFALO L. REV. 163 (1953); Note, *Discretionary Exception Under Federal Tort Claims Act: Sovereign Immunity Dies a Slow Death*, 4 DUKE B.J. 34 (1954); Note, *Federal Tort Claims Act—Discretionary Function Exception*, 8 RUTGERS L. REV. 412 (1954); Note, *Texas City Disaster—Federal Tort Claims Act*, 22 U.K.C.L. REV. 176 (1954); Note, *Tort Claims Act—Discretionary Exception Precludes Federal Liability in Texas City Explosion*, 101 U. PA. L. REV. 420 (1952). Some found the decision largely unobjectionable. See Note, *Torts—Federal Tort Claims Act—Discretionary Function Exception*, 38 MINN. L. REV. 175 (1954). Others believed that, because of the unusual fact situation there presented, the case would have limited importance. See Heuser, *Dalehite v. United States: A New Approach to the Federal Tort Claims Act*, 7 VAND. L. REV. 175 (1954).

6. 350 U.S. 61 (1955). The government had conceded that no discretionary function was actually involved in the case—which concerned the Coast Guard's allegedly negligent operation of a lighthouse—but contended that there could be no liability for a uniquely governmental activity. The Court rejected that argument. See generally Comment, *Judicial Interpretation of the Federal Tort Claims Act*, 14 AM. U.L. REV. 200, 206 (1965).

7. 352 U.S. 315 (1957). This case dealt with alleged negligence of the Forest Service in fighting a forest fire. The discretionary function exception was found irrelevant, though without extended discussion. The Court, reaffirming the view taken in *Indian Towing Co.*, indicated that the United States is in general liable under the Federal Tort Claims Act whenever a private person would be liable under the same circumstances. See generally Pound, *The Tort Claims Act: Reason or History?*, 30 NACCA L.J. 404 (1964).

8. For a discussion of this more limited view of immunity, see Note, *Federal Tort Claims Act—Discretionary Function Exception*, 39 B.U.L. REV. 268 (1959); Note, *Torts—Federal Tort Claims Act—The Discretionary Function Exemption to the Federal Tort Claims Act Is Limited Strictly to Policy Formulation*, 45 U. CIN. L. REV. 157 (1976); Note, *Torts—Federal Tort Claims Act—Psychiatrists' Diagnosis Is Discretionary Act Within Exception to Governmental Tort Liability*, 48 VA. L. REV. 1480 (1962).

9. See *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975) (F.B.I. agent's handling of airline hijacking situation not discretionary); *White v. United States*, 317 F.2d 13 (4th Cir. 1963) (decision to let mental patient roam hospital grounds unsupervised was operational); *United States v. Hunsucker*, 314 F.2d 98 (9th Cir. 1962) (negligent construction of drainage ditch and sewage-disposal system held operational); *United States v. Gregory*, 300 F.2d 11 (10th Cir. 1962) (decision to renovate canals was at planning level); *American Exch. Bank v. United States*, 257 F.2d 938 (7th Cir. 1958) (non-installation of handrail at post office was operational); *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955), *aff'd mem. sub nom.* 350 U.S. 907 (1955) (air traffic controllers held to be acting at operational level).

10. Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 125-32 (1968).

critics.¹¹ What has transpired in the past twenty years? Has the compromise position clearly prevailed, or have the courts returned to the sweeping application given the exception in the *Dalehite* case? Consider the following occurrences: (1) continued use by the lower federal courts of the tests earlier formulated; (2) the leading Supreme Court case of recent years in this area; (3) how that case reflects or rejects prior authority and suggestions of commentators; (4) the reaction to that opinion in subsequent cases and writings; and (5) conclusions that may be drawn as to the desirable state of the law.

Continued Development of Planning v. Operational Test

For some years, the planning v. operational distinction was much used in lower federal courts and was often taken as the accepted standard in applying the exception. Thus, in a 1981 case in which the United States was sued for alleged negligence in licensing a private company for manufacture of polio vaccine, it was held that the exception's applicability could not be determined without evidence of whether the licensing decision involved policy-making on the part of the government.¹² The "policy-making" test for deciding the exception's relevance was said to be "in accord with the weight and trend of authority," both in the cases and the writings.¹³ Liability was conceded to be possible, where the government's negligence in approving a specific batch of vaccine was shown because such negligence was outside the exception's scope.¹⁴ This did not necessarily mean, however, that liability could be imposed for governmental approval of a formula for a *type* of vaccine.¹⁵ The "planning" level, to which immunity applies, has generally been said to involve policy-making, such as establishing basic goals and programs for the country's economic and social well-being, while the operational level involves the day-to-day routine operation of the government.¹⁶ A court must consider evidence of the nature of the particular, allegedly tortious act in making the planning v. operational classification.¹⁷

11. See Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956).

12. *Schindler v. United States*, 661 F.2d 552, 557 (6th Cir. 1981). See *Berkowitz v. United States*, 108 S. Ct. 1954 (1988), discussed *infra* notes 131-34 and accompanying text, saying that liability depends on whether "policy choices" were involved in the licensing of a vaccine, but very broadly defining such choices.

13. *Schindler*, 661 F.2d at 555 (citing *Wright v. United States*, 568 F.2d 153 (10th Cir. 1977), *cert. denied*, 439 U.S. 824 (1978)); *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978).

14. *Schindler*, 661 F.2d at 556 (citing *Griffin v. United States*, 351 F. Supp. 10 (E.D. Pa. 1972), *aff'd*, 500 F.2d 1059 (3d Cir. 1974)).

15. *Schindler*, 661 F.2d at 556.

16. See *Madison v. United States*, 679 F.2d 736 (8th Cir. 1982) (award of government contract for manufacturer of explosives and promulgation of safety manual and regulations for government contractors were within exception).

17. See *Driscoll v. United States*, 525 F.2d 136 (9th Cir. 1975) (decision not to install warning devices, barriers, speed control devices, etc. on air force base streets held to have been made at planning, not operational, level); *Abraham v. United States*, 465 F.2d 881, 883 (5th Cir. 1972)

It has been recognized that "discretion," in a broad sense, is involved in all decisions and choices. To come within the exception, the "discretion" must encompass deliberation or the setting of goals—for instance, the judgment involved in issuing a permit to hold a motorcycle race on federal land, as opposed to the more mundane judgment involved in the operational tasks of setting out and marking the race course.¹⁸ Drawing a line between what are essentially only different kinds of "discretionary" acts is, at best, a difficult chore. The planning v. operational test has been attacked as producing inconsistent results in application,¹⁹ as illustrated by one case which found that dredging of irrigation canals involves planning²⁰ while another case ruled that faulty construction of a sewage disposal system is operational.²¹

Commentators have also criticized the planning v. operational test as involving no more than a "status" distinction that finds "discretion" in, and therefore gives immunity to, all conduct undertaken by anyone in a relatively high government position.²² Certainly it is true that the governmental rank of the person making the allegedly tortious decision has sometimes been a consideration in application of the planning v. operational test. Courts have often denied immunity where the person was not a member of a tribunal or legislative body or head of an executive department. One example is air traffic controllers. Despite the obviously great amount of judgment that air traffic controllers must exercise in performing their job, courts have held their giving directions to planes preparing to land at an airport to be at the operational level.²³ Another example, the government's operation of dams, may come within the exception in many respects; but, Bureau of Reclamation employees' failure to post warnings to water skiers in a particular recreational area behind a dam is at the operational level.²⁴

(affidavit of air force officer merely stating opinion that mismanagement causing sonic boom had occurred at operational level raised no genuine issue of material fact where nature of mismanagement was not described).

18. See *Thompson v. United States*, 592 F.2d 1104 (9th Cir. 1979).

19. Comment, *Scope of the Discretionary Function Exception Under the Federal Tort Claims Act*, 67 GEO. L.J. 879, 888-89 (1979). See generally Note, *Federal Tort Claims: A Critique of the Planning Level-Operational Level Test*, 11 U.S.F. L. REV. 170 (1976).

20. *United States v. Gregory*, 300 F.2d 11, 13 (10th Cir. 1962).

21. *United States v. Hunsucker*, 314 F.2d 98, 105 (9th Cir. 1962).

22. See Comment, *supra* note 19, at 889. Thus, the author notes, liability may sometimes be rejected for a high official's actions even if they really amount to no more than ordinary operational-level negligence, or the actions of even a low-level officer may be found immune if they were approved by a superior in a clearly planning-level position. *Id.* & n.95.

23. *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955), *aff'd mem. sub nom.*, 350 U.S. 907 (1955). Cf. *Sullivan v. United States*, 299 F. Supp. 621 (N.D. Ala. 1968), *aff'd*, 411 F.2d 794 (5th Cir. 1969) (preparation of flight chart operational); *Wildwood Mink Ranch v. United States*, 218 F. Supp. 67 (D. Minn. 1963) (carelessness in selection of flight plan held operational). See generally Annotation, *Liability of United States for Negligence of Air Traffic Controllers*, 46 A.L.R. FED. 24, 33-37 (1980).

24. *Lindgren v. United States*, 665 F.2d 978 (9th Cir. 1982). The court stated that the prevailing test in the Ninth Circuit is the planning-v.-operational test as enunciated in *Thompson v. United States*, 592 F.2d 1104, 1111 (9th Cir. 1979) (cited in *Lindgren*, 665 F.2d at 980). The *Lindgren* court distinguished *Spillway Marina, Inc. v. United States*, 330 F. Supp. 611 (D. Kan. 1970), *aff'd*, 445 F.2d 876 (10th Cir. 1971), where the lowering of the water level in a reservoir by the Corps of Engineers was held discretionary. It was noted that the *Spillway* case involved damage

A subtest within the basic planning v. operational test has sometimes emerged: the distinction between policy-making and implementation. Thus, a government agency's decision to ignore one of its own regulations in a particular situation may be found operational, while the agency's issuance of a notice to its field personnel instructing them in general terms to ignore the regulation may be considered policy-making.²⁵ The former situation involves mere implementation, or nonimplementation, of existing policy in a specific instance, while the latter situation essentially involves reframing or repealing the basic rule. It is generally agreed that the establishing, promulgating and repealing of laws and regulations is at the policy-making level.²⁶ Issuance of, or refusal to issue, a license or permit has usually been similarly treated as policy-making,²⁷ as has the decision of government officials to prosecute or not prosecute a suspected lawbreaker.²⁸ Because some judgment is involved in any action (or inaction), the essential question is whether exercise of the judgment required *policy* considerations.²⁹ Thus, courts have called the ordering of an army maneuver discretionary, while negligent operation of a vehicle during the maneuver involves implementation and would be at the operational level, and thus nondiscretionary.³⁰ Where facts must be weighed and policy considerations balanced in making a decision, as in deciding whether to order the closing of a mine, courts have found the exercise of such planning discretion.³¹

directly caused by government action; to require the government to give warnings in all situations in which its conduct might cause damage was considered too great a burden. On the other hand, in *Lindgren* the government's action produced only a hazard, no direct damage; to require a warning in those situations was deemed not administratively burdensome. *Lindgren*, 665 F.2d at 981-82.

25. See *Hoffman v. United States*, 398 F. Supp. 530 (E.D. Mich. 1975) (Federal Aviation Administration ignored own regulation and subsequently made policy decision to formulate a notice which in effect instructed its field personnel to ignore regulation).

26. See *Garbarino v. United States*, 666 F.2d 1061 (6th Cir. 1981) (Federal Aviation Agency's adoption of standards for certification of aircraft).

27. *Lawrence v. United States*, 381 F.2d 989 (9th Cir. 1967) (failure to issue permits to occupy Indian lands); *United States v. Morrell*, 331 F.2d 498 (10th Cir. 1964), *cert. denied*, 379 U.S. 879 (1964) (issuance of grazing permits as to public lands); *Chournos v. United States*, 193 F.2d 321 (10th Cir. 1951), *cert. denied*, 343 U.S. 977 (1952) (denial of grazing permits as to public lands); *Smith v. United States*, 101 F. Supp. 87 (D. Colo. 1951), *appeal dismissed*, 196 F.2d 222 (10th Cir. 1952) (reduction of grazing privileges as to public lands).

28. *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967), *cert. denied*, 389 U.S. 841 (1967); *Brooks v. United States*, 152 F. Supp. 535 (S.D.N.Y. 1957). Cf. *Goddard v. District of Columbia Redevelopment Land Agency*, 287 F.2d 343 (D.C. Cir. 1961), *cert. denied*, 366 U.S. 910 (1961) (decision on institution of condemnation proceedings). The giving of legal advice may, however, be outside the area of immunity. See *Matthews v. United States*, 456 F.2d 395 (5th Cir. 1972) (complaint based on alleged negligent acts or omissions of air force legal personnel held to state a claim; should not have been dismissed on basis of misrepresentation exception of Federal Tort Claims Act).

29. See *Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1974).

30. See *Ward v. United States*, 471 F.2d 667, 670 (3d Cir. 1973).

31. *Bernitsky v. United States*, 620 F.2d 948 (3d Cir. 1980). Cf. *Old King Coal Co. v. United States*, 88 F. Supp. 124 (S.D. Iowa 1949) (coal mine owner did not have Federal Tort Claims Act suit based on administrative decision not to operate coal mine).

Another subtest sometimes stated involves the presence of a pre-existing standard. If a government official is merely called on to apply a standard that is already established or readily ascertainable, the government official's conduct does not necessitate such exercise of discretion as to come within the exception. However, if the government official must consider the purposes of a law and, in light of those purposes, decide whether the policy applies in the particular case, the exception does apply.³² Courts have held applying parole guidelines in determining the release of a particular prisoner to be operational,³³ while holding the decision to conduct Air Force training flights in supersonic aircraft—a decision not governed by existing regulations but made by the Commander of the Strategic Air Command—to be at the planning level.³⁴ Furthermore, courts have held that statutes give bank examiners such a great amount of leeway in performing their job that policy-making, not mere operation, is present in their conduct.³⁵

Sometimes, the various subtests overlap and more than one may be utilized in a particular opinion. Thus, courts have held the performance of scientific evaluation, as in the testing of polio vaccine, involves implementation, not policy-making. These scientific evaluations also concern the application of existing regulations so that the discretionary function exception does not cover this situation.³⁶

The tests and standards used in applying the discretionary function exception of the Act—particularly the planning v. operational distinction—have influenced some state courts, which often have to interpret state statutory provisions similar to the federal exception. Thus, in applying its legislation on governmental tort liability, Alaska has held failure to maintain a highway properly is negligence at the operational, not policy-making level, and therefore outside that state's discretionary function exception.³⁷ California has reasoned

32. See *Barton v. United States*, 609 F.2d 977 (10th Cir. 1979) (no fixed standards or guides exist by which effect of drought on range forage can be judged for purpose of determining whether grazing should be allowed to continue on public lands).

33. *Payton v. United States*, 636 F.2d 132 (5th Cir. 1981).

34. *Maynard v. United States*, 430 F.2d 1264 (9th Cir. 1970).

35. *Emch v. United States*, 630 F.2d 523 (7th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981). *Cf. Davis v. Federal Deposit Ins. Corp.*, 369 F. Supp. 277 (D. Colo. 1974) (issuance of cease-and-desist order to bank by Federal Deposit Insurance Corporation held discretionary).

36. *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974). See *Loge v. United States*, 662 F.2d 1268 (8th Cir. 1981) (discretionary function exception did not bar suit based on alleged negligence in licensing vaccine and in releasing particular lot), *cert. denied*, 456 U.S. 944 (1982). See generally *infra* notes 130-34 and accompanying text, discussing *Berkowitz v. United States*, 108 S. Ct. 1954 (1988) (exception inapplicable if vaccine licensed without compliance with statutory or regulatory requirements).

37. *State v. Abbott*, 498 P.2d 712 (Alaska 1972). *Cf. Aspen Exploration Corp. v. Sheffield*, 739 P.2d 150 (Alaska 1987) (governor's rejection of offshore prospecting permits held discretionary and absolutely immune in suit brought against governor personally). As the *Aspen* case indicates, a somewhat different test is often applied in cases dealing with the individual liability of government officers: instead of using the planning-v.-operational test, the courts consider "discretion" for purposes of personal immunity to mean personal deliberation and judgment. *Id.* at 155. See generally *Rogers, A Fresh Look at Agency "Discretion,"* 57 TUL. L. REV. 776, 822-24 (1983).

that the purpose of its discretionary function exception is to protect the policy decisions of coordinate branches of state government from judicial scrutiny. Therefore, California applies immunity to the formulation of policy but not to implementation of policy.³⁸ Washington State has gone so far as to infer a discretionary function exception from a statute not expressly providing one. The Washington statute declares that liability cannot be imposed in cases questioning the propriety of government objectives or programs.³⁹

Preservation of governmental freedom of choice in the adoption of basic policies justifies the Test. One commentator has observed that most planning activities, such as the promulgation of administrative regulations, involve public policy considerations, are of future effect, and affect large numbers of people.⁴⁰ These actions are normally subject to judicial review through suits for injunctions, declaratory judgments or mandamus. However, tort suits leading to possible liability are precluded as likely to curtail governmental independence. Alternatively, a tort suit for damages may be used to challenge conduct undertaken to carry out the plans—that is, operational conduct. Such conduct is subject to remedy in tort because it normally involves only the manner of execution—a matter not determined until the execution actually occurs.⁴¹

Tort liability is appropriate where a government program is negligently administered. However, tort liability is inappropriate where the decision, even if improper, is made to undertake the program in the first place. Freedom from liability is necessary to assure independence of action in the setting of basic government policy—that is, in those areas where costs must be weighed against benefits in choosing or rejecting a course of action. Otherwise, fear of liability may outweigh need and wisdom in selection of government programs. One example of such a program is the establishment of a communication system between government drug informants and their contacts in an effort to control dangerous drugs.⁴² Risks must be balanced against the need for action and the chance of success. It is really not “discretion” in the sense of “judgment” that the courts consider in need of protection in such situations so much as it is the selecting of goals and plans for the future.⁴³

Several commentators have severely criticized the Test, chiefly on the grounds that (1) it places too much weight on the rank of the alleged tortfeasor as opposed to the type of activity involved; (2) it fails to ensure predictability of result; (3) it produces confusing and inconsistent case law, and (4) it leads to uneven application.⁴⁴ While it can be argued that the Test is designed mainly

38. See *Johnson v. State*, 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352 (1968).

39. *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965).

40. Rogers, *supra* note 37, at 817.

41. See *id.* at 817-18.

42. See *Slagle v. United States*, 612 F.2d 1157 (9th Cir. 1980) (policy decision whether benefits of fool-proof means of rapid communication justified costs involved discretionary function).

43. See *United States v. Gregory*, 300 F.2d at 13 (suggesting that at the operational level there may, at least sometimes, be liability for even discretionary functions).

44. See Note, *supra* note 19, at 181-89.

to protect decisions that initiate programs or general policies from liability,⁴⁵ courts have had difficulty, and shown inconsistency, in deciding how far down the line the immunity should extend. Courts have sometimes applied immunity to decisions clearly subsequent to initiation of a policy, as where, in the course of dredging a river channel, a decision was made to dump the dredged soil on adjacent land rather than take it out to sea.⁴⁶ It is possible some of the confusion results merely from differing terminology (such as "planning" or "policy-making") used to mean the same thing. Additionally, confusion may result from the different treatment accorded scientific decision-making from that accorded government policy-making. Scientific decision-making is regarded as merely entailing consideration of objective facts and thus operational.⁴⁷

The planning v. operational test *does* give recognition to the strong feeling that government decision-makers must be free to act and experiment without the fear of subjecting the government to liability in those areas in which a number of options are available and in which some citizens are likely to be dissatisfied with any decision made.⁴⁸ But the question may then be raised: Why not end the confusion of determining where "planning" ends and "operation" begins by limiting the exception's application to the initial choice to undertake a program? At the same time, courts could accord immunity to basic policy choices that Congress apparently intended to immunize. Courts have occasionally mentioned such a limitation on the exception in cases primarily employing the planning v. operational test.⁴⁹ Beyond that, some opinions have used the "initiation" limitation as a test in itself—sometimes referred to as the "Good Samaritan" test.⁵⁰

45. See Note, *The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1047, 1060-64 (1968) (discussing federal cases interpreting the discretionary function exception of the Federal Tort Claims Act and arguing they cannot appropriately be used in applying the statutory exception for discretionary acts of municipalities under Minnesota law).

46. *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1965).

47. See Harris & Schnepfer, *Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161, 172 (1976). This article contains a good statement of the general rejection of the sweeping *Dalehite* interpretation of the exception that occurred in the quarter century that followed the *Dalehite* case: "Modern cases make it clear that the absolutist interpretation of the discretionary function exception taken by the *Dalehite* majority has not been adopted. In order to fall within the scope of the exception, it is not sufficient for the government to demonstrate merely that some choice was part of the decisionmaking process." *Id.* at 171 (citing *J.H. Rutter Rex Mfg. Co. v. United States*, 515 F.2d 97 (5th Cir. 1975), *cert. denied*, 424 U.S. 954 (1976)).

48. See Comment, *Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?*, 36 U. MIAMI L. REV. 489, 520-21 (1982) (discussing the reasons for governmental immunity as to discretionary decisions).

49. See *Seaboard Coast Line R.R. v. United States*, 473 F.2d 714 (5th Cir. 1973) (once government decided to build drainage ditch in course of constructing aircraft maintenance facility, it was no longer performing discretionary function and was required to perform operational task of building ditch in a nonnegligent manner).

50. See Reynolds, *supra* note 10, at 107-08, in which the author discusses some of the cases applying this test.

Continued Development of "Good Samaritan" Test

The United States Supreme Court in *Indian Towing v. United States*,⁵¹ employed the Good Samaritan test and held the federal government to the same standard of reasonable care to which a private person would be held whenever the government, even though voluntarily, undertakes a particular activity. In *Indian Towing*, the government activity was operating a lighthouse. Unless required by law to act, the government is free to be either active or passive without risk of liability; but, once the decision is made for the government to engage in an activity, the usual rules of tort liability apply to its conduct, regardless of whether the initial decision was at the planning or operational level.⁵² The Good Samaritan test, also known as the "Good Samaritan doctrine," derived its name from cases where the government voluntarily undertook conduct helpful to others.⁵³ Courts have applied the Good Samaritan test to a number of cases involving public works projects, such as dams and flood control facilities. Once the initial decision to undertake such a project is made, decisions about the details of design and operation will be outside the scope of immunity—for instance, when a naval radio tower was built without guard rails, causing a painter on the tower to fall to his death.⁵⁴

The distinction between policy-making and implementation creeps into the Good Samaritan test also. If policy factors have to be weighed in deciding the design for the project, the design decisions may be considered discretionary. Two examples of discretionary design decisions were: (1) a decision facing the Secretary of Commerce of whether the proposed design for an interstate highway was adequate to meet traffic needs,⁵⁵ and (2) consideration by the Army Corps of Engineers of navigational needs, irrigation requirements and rainfall in determining whether to release or store water in a reservoir.⁵⁶ Indeed, the Good Samaritan test is often used in conjunction with the planning

51. 350 U.S. 61 (1955). See authorities cited *supra* note 6.

52. See *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955). While *Dalehite* had stated that, even under the Federal Tort Claims Act, a presumption of governmental immunity exists until overcome by clear Congressional relinquishment, *Indian Towing Co.* indicates that the intent of the Act was to relinquish immunity except as clearly provided to the contrary. For further discussion, see the dissenting opinion in *Laird v. Nelms*, 406 U.S. 803 (1972) (citing *Rayonier Inc. v. United States*, 352 U.S. 315, 319-20).

53. See *Block v. Neal*, 460 U.S. 289, 294 (1983) (Court distinguishing between a question involving the "misrepresentation" exception to the Federal Tort Claims Act from questions dealing with "Good Samaritan" claims).

54. *Stanley v. United States*, 347 F. Supp. 1088 (D. Me. 1972), *vacated on other grounds*, 476 F.2d 606 (1st Cir. 1973). For application of the exception to public works projects, see generally *Harris & Schnepper*, *supra* note 47, at 182-84.

55. See *Daniel v. United States*, 426 F.2d 281 (5th Cir. 1970).

56. *Spillway Marina, Inc. v. United States*, 330 F. Supp. 611 (D. Kan. 1970), *aff'd.*, 445 F.2d 876 (10th Cir. 1971). Cf. *Boston Edison Co. v. Great Lakes Dredge & Dock Co.*, 423 F.2d 891 (1st Cir. 1970) (Secretary of Army's decision to dredge river held discretionary); *York Cove Corp. v. United States*, 317 F. Supp. 799 (E.D. Va. 1970) (negligence in conducting dredging operation would be discretionary).

v. operational standard. This use of the Good Samaritan test occurs because the immunized "decision to initiate" is frequently interpreted to mean the same thing as the "planning-level decision," while the subsequent performance is, at least to the extent that it does not involve policy choices, characterized as being at the operational level.⁵⁷ Thus, one court has called the decision to construct a drainage ditch "discretionary" because planning was involved, and termed the subsequent functions of design and construction "operational" and thus nondiscretionary.⁵⁸

The Good Samaritan test tends to encourage inaction in areas where the government is accorded discretion regarding whether to act. Thus, if the Coast Guard is by statute granted discretionary authority to establish aids to navigation, it will not be liable for a failure to act—such as a failure to erect a light at the end of a breakwater.⁵⁹ Neither will the Coast Guard be liable for an initial decision to *take* action; but in then acting, it will be subject to possible liability, as where it negligently locates a buoy at an improper place.⁶⁰ In cases of governmental medical treatment, the United States will be liable for negligent treatment once the providing of such care, even voluntarily, is commenced.⁶¹ The refusal to treat, on the other hand, will be within the area of immunity so long as the government has discretion to refuse. But an "undertaking" to treat can often be found where the government provides very little care. Thus, the government may be held liable for negligent care if it had treated the patient in the past, known of the patient's condition, and examined the patient, though it then declined to admit this patient to the hospital.⁶² Similarly, once the government incarcerates a prisoner, it is held to a standard of due care in determining the specific facility in which to confine the prisoner.⁶³

One court held that although the initial decision of the government to establish an air traffic control system is discretionary, once that decision is made the government's employees are responsible for operating the system with reasonable care. The government is liable for acts of both commission and omission.⁶⁴ Thus, the government can be liable for a controller's incor-

57. See Comment, *Scope of the Discretionary Function Exception Under the Federal Tort Claims Act*, 67 GEO. L.J. 879, 889-91 (1979). The author concludes that the "Good Samaritan test" parallels the planning-v.-operational test and, like the latter, fails to offer courts any clear guidance when facing a new fact situation. *Id.* at 890.

58. *Seaboard Coast Line R.R.*, 473 F.2d at 716.

59. *Bearce v. United States*, 614 F.2d 556 (7th Cir. 1980), *cert. denied*, 449 U.S. 837 (1980).

60. *Somerset Seafood Co. v. United States*, 193 F.2d 631, 635 (4th Cir. 1951).

61. See *Rise v. United States*, 630 F.2d 1068 (5th Cir. 1980) (having undertaken to provide medical treatment to wife of retired Army officer, Army owed duty of reasonable care, which did not come within exception). See also Kiel, *Medical Malpractice Claims Against the Army*, 75 MIL. L. REV. 1 (1977).

62. *Supchak v. United States*, 365 F.2d 844 (3d Cir. 1966).

63. *Brown v. United States*, 374 F. Supp. 723 (E.D. Ark. 1974) (liability imposed for negligence in placing federal prisoner in substandard county jail, where he was assaulted by other inmates).

64. *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967). But many cases involving alleged negligence of air traffic controllers use the planning-

rect report to a pilot of "minimum descent altitude" if this results in a crash of the plane or other harm.⁶⁵ Similarly, the government can be liable for negligently stationing an airport attendant in a room so insulated that the attendant cannot hear circling aircraft and is unaware of the need for him to turn on runway lights.⁶⁶ The government can also be liable for publishing false information about runway lighting.⁶⁷ Of course, in any such situation, the United States is liable only for negligence or other tortious conduct. It is not, for instance, liable for the publication of false information unless this occurred through a lack of reasonable care.⁶⁸ There is also the usual requirement of actual causation: a failure to inspect an aircraft or warn of possible danger will, for example, not lead to liability unless the omitted inspection or warning would have prevented plaintiff's harm.⁶⁹

Continued Development of Dalehite Tests

In addition to using the aforementioned planning v. operational test and the Good Samaritan standard, courts applying the discretionary function exception have sometimes simply relied on a very broad interpretation of "discretionary." Courts have found discretion present, for example, in any decision, no matter how narrow or trivial, carrying out an undertaking that in its initiation involved planning or policy-making.⁷⁰ Their findings may be considered an application of the reasoning of the leading *Dalehite* case, since immunity was there extended to the manufacturing, bagging and labeling of fertilizer partly because the basic decision to undertake the fertilizer export program had occurred on the planning level.⁷¹ Because *Dalehite* spoke in terms of the planning level and the operational level, it may be considered to support the planning v. operational test as well.⁷² But since the case immunized practically everything involved in executing a planning decision, one commentator

v.-operational test—with the same result of possible liability. See *United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964). See generally *supra* note 23 and accompanying text.

65. *Ross v. United States*, 640 F.2d 511 (5th Cir. 1981).

66. *Sullivan v. United States*, 299 F. Supp. 621 (N.D. Ala. 1968), *aff'd.*, 411 F.2d 784 (5th Cir. 1969).

67. *Murray v. United States*, 327 F. Supp. 835 (D. Utah 1971) (alleged negligence in publishing and disseminating aeronautical charts and information falsely indicating that either runway lighting at airport was available throughout night or that it was available upon request).

68. See *Swoboda v. United States*, 662 F.2d 326 (5th Cir. 1981) (FAA exercised reasonable care in notifying proper authorities of pilot's difficulties after he was overdue and failed to make position report), *cert. denied*, 457 U.S. 1134 (1982).

69. See *Zabala Clemente v. United States*, 567 F.2d 1140 (1st Cir. 1977) (failure to inspect plane did not add to risk of injury to passengers or crew), *cert. denied*, 435 U.S. 1006 (1978).

70. See Reynolds, *supra* note 10, at 108-10.

71. *Dalehite v. United States*, 346 U.S. 15, 38-42 (1953). See Reynolds, *supra* note 10, at 93-94, 96-98.

72. See *Dalehite*, 346 U.S. at 34-36. But it has been noted that the planning-v.-operational language in *Dalehite* is dictum. Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207, 219 n.37 (1956).

regarded *Dalehite* as chiefly illustrating a very broad application of the exception and a very narrow application of the Act.⁷³

Another author suggested that *Dalehite* supports the exception's relevance wherever *any* degree of judgment ("discretion") is involved in the allegedly tortious governmental conduct, even if at the operational level. Thus, courts should not "read in" any planning v. operational, or similar, distinction unless the Act is amended to provide this.⁷⁴ This use of *Dalehite* is sometimes referred to as involving a "quality of decision" test since it applies the exception whenever a governmental decision-maker, at any level, considers policy factors in acting within his authority by making a decision.⁷⁵

Thus, *Dalehite* has been relied on by cases taking two slightly differing, but both very broad, interpretations of the exception: (1) interpreting it as immunizing every act undertaken in the execution of an initial policy decision, and (2) interpreting it as immunizing all decisions, however detailed and at however low a level, that involve some policy choices. In either case, the result is an interpretation that can leave the Act nearly emasculated by the exception.

The Varig Case: Returning to Dalehite?

While some of the above-cited cases indicated for a time a trend away from the broad *Dalehite* interpretation of the exception, the United States Supreme Court reaffirmed *Dalehite* in the 1984 case of *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*.⁷⁶ In *Varig* the plaintiff alleged negligence in the FAA's failure to check specific items in the course of certifying two particular aircraft for use in commercial flight. In one of the consolidated cases, the lavatory trash receptacle allegedly did not meet applicable safety regulations, leading to an on-board fire that killed most of the passengers. In the other case, a gasoline-burning heater was held not to have

73. See Jacoby, *Roads to the Demise of the Doctrine of Sovereign Immunity*, 29 ADMIN. L. REV. 265, 285 (1977) (referring to *Dalehite*'s "very strict interpretation" of the Act, followed by more liberal interpretations in later cases).

74. Comment, *Discretionary Function Exception to Federal Tort Liability*, 2 CUMB. L. REV. 383, 399-400 (1971). The author views the planning-v.-operational distinction as not intended by Congress. *Id.* at 383. The author further states this distinction is not specifically supported by *Dalehite*, which refers to the distinction but does not clearly base its finding of immunity on it. See *id.* at 393.

75. See Comment, *Scope of the Discretionary Function Exception Under the Federal Tort Claims Act*, 67 GEO. L.J. 879, 891-93 (1979). The author finds the quality-of-decision test supported by *Dalehite*'s reference to discretion depending upon "policy judgment and decision." *Id.* at 892. Among other cases cited as supporting this test are *First Nat'l Bank in Albuquerque v. United States*, 552 F.2d 370 (10th Cir. 1977) (immunity for approval of warning labels on grain), *cert. denied*, 434 U.S. 835 (1977); *Griffin v. United States*, 351 F. Supp. 10 (E.D. Pa. 1972) (no immunity for negligent releases of defective polio vaccine following scientific evaluation), *aff'd*, 500 F.2d 1059 (3d Cir. 1974); *Pigott v. United States*, 451 F.2d 574 (5th Cir. 1971) (*per curiam*; vacating district court ruling of immunity as to test firing of NASA rocket).

76. 467 U.S. 797 (1984), *reh'g denied*, 468 U.S. 1226 (1984).

been in compliance with federal regulations. The Court found both suits barred by the discretionary function exception. Citing *Dalehite* with approval and indicating that there had been no retreat from its broad application of the exception, the Court stated that: (1) it is the nature of the allegedly tortious conduct, not the status of the actor who engages in the conduct, that determines the exception's relevance; (2) the exception clearly covers the government's discretionary acts in regulating the conduct of private parties; (3) the FAA's implementation of a mechanism, such as spot-checks, to enforce compliance with its regulations is a discretionary decision and thus within the exception and (4) the acts of FAA employees in executing the spot-checks are also within the exception since those employees are "specifically empowered to make policy judgments" in administering the program.

Varig seems to take the "quality of decision" approach and apply immunity to any determination, no matter at what level and without regard to any "planning" or "operational" label, that involves the weighing of policy factors. The Court adopted a rule of absolute immunity more sweeping as to the federal government than as to federal officials sued as individuals.⁷⁸ The Court clearly repudiated, as to government liability, any test based on the status of the officer or employee whose conduct is alleged to have been tortious. The Court implicitly rejected both the planning v. operational test and the Good Samaritan test,⁷⁹ and it continued the trend of rigid interpretation of the Act indicated by its earlier holding that the United States cannot be held strictly liable (that is, liable without fault) under that law.⁸⁰

77. *Id.* at 820. There was a significant difference in the facts of the two cases consolidated in the Court's *Varig* decision: in *Varig*, the FAA had decided not to inspect the aircraft lavatory, where the harmful defect appeared. *Varig Airlines v. United States*, 16 Av. Cas. (CCH) 17,577, 17,586-89 (C.D. Cal. May 12, 1981), *aff'd*, 692 F.2d 1205 (9th Cir. 1982), *rev'd*, 467 U.S. 794 (1984). In the other case, the FAA had actually inspected the aircraft's heater which subsequently proved defective. *United Scottish Ins. Co. v. United States*, No. CV71-36E, slip op. at 2 (S.D. Cal. Feb. 24, 1980), *aff'd*, 692 F.2d 1209 (9th Cir. 1982), *rev'd*, 467 U.S. 797 (1984). The Court ignored the factual distinction and thus appeared to apply the discretionary function exception even to a negligent inspection. See Comment, *United States v. Varig Airlines: The Supreme Court Narrows the Scope of Government Liability Under the Federal Tort Claims Act*, 51 J. AIR L. & COM. 197, 215-21 (1985). On the differences between the two consolidated cases, see generally Comment, *United States v. Varig: Can the King Only Do Little Wrongs?*, 22 CAL. W.L. REV. 175, 186-92 (1985).

78. See *Westfall v. Erwin*, 108 S. Ct. 580 (1988) (conduct of federal officials is immune from state-law tort liability only if it is discretionary, and fact that precise conduct was not mandated by law is insufficient to establish discretionary nature; absolute immunity unnecessary and unwise in many situations). Cf. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (executive officials of federal government generally enjoy only qualified or "good faith" immunity from personal liability for unconstitutional conduct; federal officials seeking absolute immunity must bear burden of showing that public policy requires such exemption).

79. See *Varig*, 467 U.S. at 811-14.

80. *Laird v. Nelms*, 406 U.S. 797 (1972) (no strict liability due to presence of ultrahazardous activity for planning or operation of supersonic flight). See Peck, *Laird v. Nelms: A Call for Review and Revision of the Federal Tort Claims Act*, 48 WASH. L. REV. 391 (1973); Reynolds, *Strict Liability Under the Federal Tort Claims Act: Does "Wrongful" Cover a Few Sins, No*

Previously, a minority of lower federal courts took this approach to the discretionary function exception. Two courts held the decision of when to impound and when to release water stored in a government reservoir to be "discretionary."⁸¹ Finding policy factors inevitably involved, the Fifth Circuit had made a similarly broad application of the exception to the determination by government attorneys of whether to prosecute particular persons.⁸² In awarding contracts, government officers do not act in a purely ministerial fashion⁸³ but are accorded some discretion, for the exercise or abuse of which the government is not liable. The same has been held true of officers' renewal or nonrenewal of government contracts.⁸⁴

More specifically as in the *Varig* case, federal courts have previously treated government promulgation of regulations or failure to promulgate regulations as within the discretion broadly protected from liability by the exception.⁸⁵ Enforcement of regulations has been similarly treated when the enforcing officer was granted authority to make exceptions—namely, to decide when the policy behind the regulation required the policy's application and when the policy was inapplicable. Thus, the commander of a military reservation was held to be acting within the exception when deciding under what circumstances to allow political demonstrations on the reservation.⁸⁶ The court reasoned such a decision required consideration and balancing of policy factors (free speech v. national security, etc.), as contrasted with the decision of an air traffic controller to give a pilot clearance for take-off. The controller's decision calls for considerable judgment and deliberation but does not involve policy choices

Sins, or Non-Sins?, 23 AM. U.L. REV. 813 (1974). While *Dalehite* had found no strict liability under the Federal Tort Claims Act, there were later indications that such liability might be allowed, and thus the question remained in some doubt until *Laird*. See Reynolds, *supra* note 10, at 94 n.71.

81. *Pierce v. United States*, 650 F.2d 202 (9th Cir. 1981); *Spillway Marina, Inc. v. United States*, 330 F. Supp. 611 (D. Kan. 1970), *aff'd*, 445 F.2d 876 (10th Cir. 1971).

82. *Smith v. United States*, 375 F.2d 243 (5th Cir. 1967), *cert. denied*, 389 U.S. 844 (1967). The court stated: "Most conscious acts of any person whether he works for the government or not, involve choice. Unless government officials (at no matter what echelon) make their choices by flipping coins, their acts involve discretion in making decisions." *Id.* at 246. *Cf. Butz v. Economou*, 438 U.S. 478 (1978) (officials of federal agencies who perform functions analogous to those of a prosecutor are entitled to absolute immunity from damages for their decisions to initiate or continue a proceeding).

83. *Scanwell Laboratories, Inc. v. Thomas*, 521 F.2d 941 (D.C. Cir. 1975) (claim of disappointed bidder that contract had been awarded another due to Federal Aviation Administration's acceptance of nonresponsive bid showed at most an abuse of discretion), *cert. denied*, 425 U.S. 910 (1976).

84. See *Myers & Myers, Inc. v. United States Postal Serv.*, 527 F.2d 1252 (2d Cir. 1975) (postal service's contract-renewal conduct).

85. See *Loge v. United States*, 662 F.2d 1268 (8th Cir. 1981) (government allegedly negligent in promulgating or failing to promulgate regulations that would ensure safety of live, oral poliovirus vaccine), *cert. denied*, 456 U.S. 944 (1982).

86. *Kiiskila v. United States*, 466 F.2d 626 (7th Cir. 1972) (regulation generally prohibited political demonstrations but permitted commander to grant exceptions).

and is not immune from liability.⁸⁷ But in the years just prior to *Varig*, cases taking such a broad view of the exception had become fairly rare.

On the other hand, the *Varig* opinion is, in some respects, in line with trends previously evidenced in Supreme Court and lower federal court cases: *Varig* firmly establishes as law the view that it is the nature of the decision, not the rank of the decision-maker, that determines the discretionary exception's application.⁸⁸ *Varig* reiterates the definition of "discretionary acts" as those that involve some policy judgment and decision.⁸⁹ This interpretation is in accord with the oft-made assumption that the legislative intent in including the discretionary function exception in the Act was the protection of policy decisions from judicial interference.⁹⁰ The case also illustrates again the Supreme Court's tendency to give broad application to the Act's exceptions in order to achieve Congress' purpose of seeing that certain governmental activities are not disrupted.⁹¹

Prior to *Varig*, it had been possible to interpret the leading *Dalehite* case in at least two ways: as granting immunity to all actions taken in performance of an initially discretionary decision, or as granting immunity to all decisions—at whatever level—that themselves involved policy choices.⁹² The Court made clear its adherence to the latter view of *Dalehite*, by emphasizing that immunity in *Varig* was granted to FAA employees because they had the authority to make policy judgments and take calculated risks in order to advance governmental aims.⁹³ All of this is arguably beneficial and certainly defensible. But the view the Court took of the exception is an extremely sweeping one in that it wipes out prior indications by the Court that the exception would be limited to choices of basic planning goals, and cancels efforts of lower federal courts to impose such a limitation. The exception will now apply to determinations by governmental officials, at however low a level, regard-

87. See *Furumizo v. United States*, 245 F. Supp. 981 (D. Haw. 1965) (United States negligent in giving student pilot clearance to take off).

88. This is the view strongly advocated by Harris & Schnepfer, *supra* note 47, at 188-90.

89. A good discussion of this definition and of *Dalehite* is found in Comment, *Agent Orange and the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?*, 36 U. MIAMI L. REV. 489, 516-17 (1982).

90. See Note, *Sovereign Immunity—The Government Contractor Defense: Preserving the Government's Discretionary Design Decisions*, 57 TEM. L.Q. 697, 705 (1984) (citing *Payton v. United States*, 636 F.2d 132, 143 (5th Cir. 1981) (release of psychotic prisoner from federal prison involved some nondiscretionary activities)). See generally Note, *Federal Tort Claims Act: The Development and Application of the Discretionary Function Exemption*, 13 CUMB. L. REV. 535, 567 (1983) (due to separation of powers doctrine, judicial branch should not examine certain executive-level decisions); Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930 (1971).

91. See *Kosak v. United States*, 465 U.S. 848 (1984) (Congress created exceptions to Act in order to prevent disruption of government activities, avoid exposure of U.S. to liability for excessive or fraudulent claims, and exclude from coverage suits for which adequate remedies were already available; exception concerning detention of goods by customs officers here applied).

92. See Reynolds, *supra* note 10, at 98.

93. See *Varig*, 467 U.S. at 820.

ing the method of applying statutes or regulations in order to achieve governmental purposes — not just to the adoption or rejection of particular purposes. The exception applies not merely to enactment of rules, not merely even to decisions to enforce rules, but also to the *manner* of enforcement so long as some “policy judgment” lies behind the selection of the manner. “Discretion,” in effect, is now interpreted not to mean “planning for the future” but “judgment-calls based on governmental goals.” Is this desirable, or could a better test be developed?

Suggestions of Commentators: Does Varig Incorporate Them?

It has been suggested that the discretionary function exception might be eliminated altogether without significant harm to the government. Elimination of the exception would be no more likely to cause financial ruin to the federal government than conventional tort liability is to wreck private businesses. The elimination of immunity could well result in more effective government through more thorough examination of decisions by its officials.⁹⁴ It is argued that fear of interference with governmental officials’ free exercise of judgment may, to the extent such fear is justified, be quashed by the grant of individual immunity to such officials, rather than blanket immunity to the government.⁹⁵ Such arguments must be addressed to Congress in support of Congress’ repeal of the discretionary function exception. Concern about possibly overwhelming government liability, the desire to ensure a means by which the courts can restrict such liability, and worry about preserving the independence of the judicial and legislative branches and of high governmental administrators are all likely to make such repeal very difficult. So long as the exception remains, it must be applied; and the *Varig* opinion shows a willingness to apply it sweepingly and often.

Some new proposals for interpreting the exception had appeared even prior to *Varig*. Discussion of the Act by commentators—in contrast to *Varig*—has tended to take the attitude that immunity is in broad terms waived by the Act and should not be assumed to exist unless an exception very clearly applies.⁹⁶ One authority urges a test that involves the weighing of three factors, all of which have been emphasized in various court opinions over the years: (1) Whether the injury resulted from government initiation of an activity or merely from the activity’s performance; (2) whether the decision was made at the planning level after consideration of public policy; and (3) whether the decision involved the weighing of political and social factors or merely

94. See Note, *Inadequacies of Federal Sovereign Immunity: A New Perspective*, 61 GEO. L.J. 1535, 1549 (1973).

95. See Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1213-14 (1977) (stressing the need to recognize the different interests that lie behind governmental immunity and official immunity).

96. See Steffen, *A Federal Tort Claims Act Tort*, 34 TENN. L. REV. 367, 370-71 (1967) (citing general rules of statutory construction).

technical ones.⁹⁷ The author adds that immunity should not apply even to all policy determinations—in particular, it should not necessarily apply to such determinations where made merely to save money.⁹⁸ As with the *Varig* opinion, this test deemphasizes the status of the official making the decision; but unlike *Varig*, it would confine immunity largely to decisions to undertake basic programs. The various factors of the proposed test are all ones that have at times been utilized by the courts in applying the planning v. operational test.⁹⁹ It is submitted that the proposal really amounts to a summary of the cases decided under the planning v. operational test, even though the author is critical of that standard. But the author is certainly correct in stating¹⁰⁰ the exception has been deemed necessary for the purpose of preventing the courts from determining government policy and of ensuring separation of powers between the judiciary and the other branches of government. The listed factors of the proposed test are directed toward those aims. The *Varig* opinion, however, by extending immunity to negligent enforcement of regulations, exceeds any such aims.

Professor Peck has suggested that immunity should exist when the consideration of liability would necessarily call into question the propriety of objectives or programs, or of a decision made by one who, within the scope of his authority, had exercised the particular choice with the purpose of advancing government objectives.¹⁰¹ This suggestion builds on the judicial language that immunity should be limited to policy decisions.¹⁰² The *Varig* opinion adopted this suggestion to the extent that immunity applies to all as a “policy judgment” and defines this judgment as involving the weighing of risks against benefits. Peck’s suggestion, like the *Varig* test, leaves the door open for a very broad interpretation of “discretion.”¹⁰³ *Varig*, however, appears to go further in its use of the exception to immunize even implementation of policy.

97. Note, *Federal Tort Claims: A Critique of the Planning Level-Operational Level Test*, U.S.F. L. REV. 170, 192-95 (1976).

98. *Id.* at 195-97.

99. See *supra* notes 12-43 and accompanying text.

100. Note, *supra* note 97, at 190, stating “[e]ssentially, the exception attempts to keep the federal courts from second-guessing policy decisions made in good faith, although negligently, by federal officials.”

101. Peck, *supra* note 80, at 417-18, quoting his suggestion made in Peck, *The Federal Tort Claims Act—A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207 (1956). Professor Peck notes that his analysis was largely adopted by the Washington Supreme Court in *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965), and was endorsed in K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 846-49 (Supp. 1970).

102. Peck quotes *Johnson v. State*, 69 Cal. 2d 782, 794 n.8, 73 Cal. Rptr. 240, 249 n.8, 447 P.2d 352, 361 n.8 (1968), in stating, “[i]mmunity for ‘discretionary’ activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government.” Peck, *supra* note 80, at 417. Cf. *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953) (“Where there is room for policy judgment and decision there is discretion.”).

103. See Reynolds, *supra* note 10, at 114.

Another suggestion made in recent years¹⁰⁴ would use the Administrative Procedure Act¹⁰⁵ (the "APA") as a guideline in applying the discretionary function exception of the Act: Issues that can be resolved in an APA suit—that is, a suit challenging the conduct of some federal administrative agency that is brought under the APA—should not be brought as tort suits. Judicial review under the APA was intended, for instance, to handle claims of abuse of agency discretion, unconstitutionality of legislation, and illegality of rules and regulations.¹⁰⁶ Where a broad program affecting numerous people in the present and future is initiated, review of legality (including constitutionality) and of the propriety of procedures should be available, but not tort liability. "Judicial review to ensure no abuse of discretion, no violation of law, and compliance with proper procedures is appropriate. The tort standards of reasonableness, proximate cause, and duty, however, do not lend themselves to such determinations. They were developed to apply to specific private acts on a case-by-case basis."¹⁰⁷

Thus, a tort suit, rather than an APA action charging unconstitutionality or abuse of discretion, is appropriate in situations where negligent driving of an automobile, or malpractice within a government hospital, is alleged, while the APA suit should be used if the allegation is issuance of improper regulations. This, again, would seem a helpful guide to what is and is not within the discretionary exception; but as the author of the suggestion admits, the exception's legislative history does not refer to the APA, which, indeed, was passed in the same year as the Act.¹⁰⁸ Again, the underlying idea can clearly be seen in the suggestion that the exception should cover development of policy, or planning for the future, but not routine implementation. And again, the suggestion was not followed by *Varig*, which would apply the exception even to conduct that is inappropriate for APA review so long as some "policy judgment" is present.

Reaction to Varig

What has been the aftermath of the *Varig* decision in the courts and commentaries? Predictably, it has been followed by many sweeping applications of the discretionary function exception. Of course, some of the cases finding the exception applicable might well have been decided the same way prior to *Varig*. For instance, one court held an FAA decision not to impose immediate regulation on a particular type of aircraft, but to postpone a decision

104. Rogers, *A Fresh Look at Agency "Discretion,"* 57 TUL. L. REV. 776, 804-09 (1983).

105. 5 U.S.C. §§ 551-59 (1976).

106. See Rogers, *supra* note 104, at 808 (quoting H.R. REP. NO. 1287, 79th Cong., 1st Sess. 6 (1945), an oft-quoted portion of the legislative history of the discretionary function exception of the Federal Tort Claims Act listing the types of cases *not* intended to be brought under the Tort Claims Act). See generally Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 U. RICH. L. REV. 281 (1980).

107. Rogers, *supra* note 104, at 814.

108. *Id.* at 808.

and accept comments on the proposed rules, a discretionary decision and thus within the exception.¹⁰⁹ The same is true as to a government decision to delegate safety responsibility over rail yard workers largely to employers, with the government conducting only “spot checks” of employer safety programs.¹¹⁰ Such decisions clearly involve choices undertaking or declining to undertake programs.

Many cases have involved decisions that arguably entail only the execution of programs or implementation of regulations. Thus, one court held the exception extends not only to broad policy decisions regarding the admission or release of Cuban refugees in general, but also to the “operational decision” to allow a particular Cuban refugee, known to be a felon convicted of a violent crime, to enter the United States.¹¹¹ The selection and supervision of participants in the federal witness protection program,¹¹² the use of and control over an informant in a Veterans Administration investigation of illegal drug sales,¹¹³ and the failure of government inspectors to warn workers on inspected premises of dangers to which they were being exposed¹¹⁴ have all been held by post-*Varig* courts to be within the exception. Failure to make adequate inspections of facilities on which federal funds are spent has been held immune,¹¹⁵ as has the negligent performance of inspections that did take place.¹¹⁶ Even such mundane determinations as the decision not to post a lifeguard at a developed swimming site in a national forest¹¹⁷ and the Postal Service’s decision to sell a used Jeep without warning the buyer of the vehicle’s propensity to overturn¹¹⁸ have been held discretionary functions. The same is true of negligence of the National Weather Service in predicting weather and tidal conditions.¹¹⁹

Occasionally, an opinion can be found, even in the post-*Varig* era, in which an activity is held to be outside the exception. Thus, one court found the

109. *Baxley v. United States*, 767 F.2d 1095 (4th Cir. 1985).

110. *Feyers v. United States*, 749 F.2d 1222 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

111. *Flammia v. United States*, 739 F.2d 202 (5th Cir. 1984).

112. *Jet Indus., Inc. v. United States*, 777 F.2d 303 (5th Cir. 1985), *cert. denied*, 476 U.S. 1115 (1986).

113. *Pooler v. United States*, 787 F.2d 868 (3d Cir. 1986), *cert. denied*, 479 U.S. 849 (1986).

114. *See Merklin v. United States*, 788 F.2d 172 (3d Cir. 1986) (former foreman in radioactive ore processing plant claims that New Jersey’s good samaritan rule imposed duty on Atomic Energy Commission’s inspectors to warn plant workers of health hazards discovered during inspections). *Cf. Shuman v. United States*, 765 F.2d 283 (1st Cir. 1985) (asbestos-related death of shipyard worker where government was sued for failure to warn of exposure).

115. *Pennbank v. United States*, 779 F.2d 175 (3d Cir. 1985) (expenditure of federal funds for municipal sewer project was discretionary function barring action for negligence in failing to inspect and discover defect in project).

116. *Hylin v. United States*, 755 F.2d 551 (7th Cir. 1985) (exception barred claim based on negligent acts and omissions of federal mine inspectors where death was caused by defective electrical junction box in mine).

117. *Wysinger v. United States*, 784 F.2d 1252 (5th Cir. 1986).

118. *Ford v. American Motors Corp.*, 770 F.2d 465 (5th Cir. 1985).

119. *Spencer v. New Orleans Levee Bd.*, 737 F.2d 435 (5th Cir. 1984).

negligent operation of a lock on the Tennessee River to be ordinary "garden-variety" negligence by government workers and hence not immune from liability.¹²⁰ Another court made a distinction between a decision to award a defense contract to a particular contractor, which was found within the exception, and a failure by the Defense Department to enforce the contractor's compliance with safety regulations, which was ruled outside the exception. The court made this distinction because no judgment involving agency policy was involved.¹²¹ An occasional case may still distinguish between the making of a decision and the decision's execution, as where the Coast Guard's execution of a decision to establish temporary buoys as an aid to navigation was held outside the exception.¹²² At least one court has still found it possible to apply the planning v. operational test, ruling that whether the government can be liable for the Army Corps of Engineers' decisions on design of a particular flood-control project depends on whether the decisions involved policy (i.e., planning) considerations.¹²³ Government decisions and actions after *Varig*, however, can, in the view of most courts, be outside the exception only if they involve mere carelessness in the handling of details.

Commentators have assailed the *Varig* decision as creating confusion in general,¹²⁴ and as leaving unclear in particular the situation as to negligently performed government inspections.¹²⁵ One author suggested the planning v. operational test is not necessarily dead, since it might be used to determine what are the "policy judgments" protected under *Varig*, and that it is the lower federal courts that are likely to remain the really significant interpreters of the exception.¹²⁶ Another commentator, however, believes *Varig* definitely

120. *Chotin Transp., Inc. v. United States*, 784 F.2d 206, 211 (6th Cir. 1986), *cert. denied*, 108 S. Ct. 344 (1987).

121. *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985). *Cf. Berkowitz v. United States*, 108 S. Ct. 1954 (1988) (failure to comply with statute or regulations in licensing of vaccine would be outside exception).

122. *Drake Towing Co. v. Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985).

123. *Alabama Elec. Coop., Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985) (dismissal based on discretionary function exception reversed; *Varig* said to support planning-v.-operational distinction). This court rejected the opinion of *Johnston v. United States*, 597 F. Supp. 473, 434 (D. Kan. 1984), in which the district court said the planning-v.-operational test was eliminated by *Varig*.

124. See Comment, *United States v. Varig: Can the King Only Do Little Wrongs?*, 22 CAL. W. L. REV. 175 (1985). The author suggests ten questions to be weighed in determining whether or not the discretionary function exception applies to a particular case. *Id.* at 194-95. The article's title draws on the *Dalehite* dissent's statement that the Act must be treated as covering more than traffic accidents or else "the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.'" *Dalehite v. United States*, 346 U.S. 15, 60 (1953).

125. See Zillman, *Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception to the Federal Tort Claims Act*, 110 M.L. L. REV. 115 (1985). See generally Comment, *United States v. Varig: Can the King Only Do Little Wrongs?*, 22 CAL. W. L. REV. 175, 197-99 (1985) (a required inspection negligently performed should be within the area of possible liability); *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985).

126. See Zillman, *supra* note 125, at 142. For an example of continued use of the planning-v.-operational test, see *supra* note 123 and accompanying text.

rejected the planning v. operational test that had so often been employed by lower courts.¹²⁷ Apparently, the Supreme Court has abolished those opinions which imposed a "Good Samaritan" duty on the United States.¹²⁸ Arguably, almost any negligence of regulatory agencies must now be regarded as within the exception,¹²⁹ and it is possible that any negligence in carrying out regulations must be similarly treated.¹³⁰

In one limited respect, a later Supreme Court case narrowed and clarified the *Varig* decision. In *Berkowitz v. United States*,¹³¹ the court held the discretionary exception does not immunize from liability any decisions made or actions taken in violation of federal statutes, regulations or specific policies. Thus, a government agency's licensing of an oral polio vaccine without receiving the safety data required by statutory directive would not be protected by the exception.¹³² The Court, however, reiterated the broad "public policy" test of *Varig*, stating the exception insulates from liability any decisions involving an element of judgment or choice and that are based on public policy.¹³³ *Varig* and *Dalehite* are left largely undisturbed, with the Court merely assuring that there is no discretion to violate specific statutory or regulatory law.¹³⁴

What Should Be The Test?

A "need for clearly articulated standards to guide judicial applications of the discretionary function exception"¹³⁵ has long been recognized. The Supreme

127. Comment, *United States v. Varig Airlines: The Supreme Court Narrows the Scope of Government Liability under the Federal Tort Claims Act*, 51 J. AIR. L. & COM. 197, 231, 239 (1985).

128. See Hatfield, *Negligent Certification of Aircraft: Supreme Court Rules Federal Government Not Liable*, 20 FORUM 359, 372 (1985).

129. See Comment, *supra* note 127, at 227.

130. See Comment, *supra* note 124, at 192-94 & 199 (stating that an actual negligent inspection was never clearly addressed in *Varig* but that the opinion leaves the door open for holding the negligence of a government agency in carrying out regulatory functions to be within the exception).

131. 108 S. Ct. 1954 (1988). This is the only "discretionary function exception" opinion handed down by the Court since the *Varig* case.

132. *Id.* at 1963. The Court noted that if petitioners were merely claiming that the government agency complied with regulatory standards but made an incorrect determination, immunity would turn on whether the determination appropriately involved any policy choice—a question not addressed in detail by the parties in this case. Therefore, this issue was left—if pressed by plaintiffs—for district court determination on remand. *Id.* Cf. *Baker v. United States*, 817 F.2d 560 (9th Cir. 1987) (negligent decision to license vaccine not barred by exception), *cert. denied*, 108 S. Ct. 2845 (1988).

133. *Id.* at 1958-60.

134. See *Fortney v. United States*, 109 S. Ct. 210 (1988), vacating and remanding, for further consideration in light of *Berkowitz*, a case concerning an explosion at an Army munitions plant. The majority remanded for determination of whether a "specific mandatory directive" of a law had been violated. Four Justices dissented, noting that the district court had, in any event, found no violation of the relevant directive. *Fortney*, 109 S. Ct. at 211.

135. Comment, *Scope of the Discretionary Function Exception Under the Federal Tort Claims Act*, 67 GEO. L.J. 879, 898 (1979).

Court attempted to satisfy that need in the *Varig* case, but fell back on a broad interpretation of "discretion" that (1) does not supply clear answers to the question of when "policy judgment" is present—the test employed by the Court, and (2) revives the worry, originated by the earlier *Dalehite* opinion, that the exception will be so broadly applied as to swallow the Act. Many of the tests suggested over the years by commentators and the courts have some merit: it is the making of policy, not its implementation, that should generally be free from judicial "second-guessing" in order to protect separation of powers. Discretion is chiefly present in situations in which there is no pre-existing standard to apply but in which a government officer must develop the standard (that is, policy) on his own. Normally the initiation of programs, not the execution of them, necessitates legislative and executive independence from full-scale judicial review. The initiation should be reviewable only in an APA action challenging the constitutionality or other legality of the program. The propriety of basic government objectives and choices should be within the "discretion" that is protected from tort liability.

All these suggested tests employ factors that can appropriately be weighed in applying the planning v. operational distinction developed by the lower federal courts. The planning v. operational test has been applied more than any other test under the discretionary exception. The basic concern under the planning v. operational test is protection of the legislating and regulating process from judicial review and from imposition of liability wherever planning for the future is concerned. The choice of goals and the initiation of programs is thereunder shielded from any review that utilizes tort standards of reasonableness; a reasonableness review of such basic decisions should rest only with the electorate. On the other hand, it is unnecessary to the separation-of-powers concept that every exercise of administrative judgment—even if based only on mistaken ideas of efficiency or cost-saving, or on mistaken notions of what *are* the relevant government goals—be protected from liability, as occurs under *Varig*. Such a result again leaves the Act applicable to little except negligent automobile driving.¹³⁶

Varig, other recent cases and writings have had the desirable effect of making clear that the emphasis in applying the exception should be on the decision, not the decision-maker. Because governmental immunity and not individual immunity is involved, the rank and position of the individual should be largely immaterial. The immunity applies to conduct rather than to persons. *Varig*, however, as well as some critics of the planning v. operational test, ignores the basic purpose of the statute: To treat the government, when it performs functions comparable to those performed by private persons and entities, as liable in tort to the same extent as those private persons and entities would be treated.¹³⁷ It is only the functions of the government exercised

136. See Gellhorn & Lauer, *Federal Liability for Personal and Property Damage*, 29 N.Y.U. L. REV. 1325, 1326 (1954), suggesting in light of *Dalehite* that the Federal Tort Claims Act should be re-titled "The Federal Negligent Operation of Motor Vehicles Act." See also authorities cited *supra* note 5.

137. See *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957). Cf. *Art-Metal-U.S.A.*,

when it is making policy *as* a government—acting of, by and for the people—that need to be immunized from tort liability in order to maintain legislative and executive independence of the judiciary. These protected functions are the planning ones. “The planning aspects are synonymous with policy considerations such as financial, political, economic and social effects. This is readily distinguishable from operational or day-to-day activities where immunity would not exist.”¹³⁸

Conclusion

The Supreme Court should reconsider the basic purpose of the Act and should re-evaluate the test developed through several decades of experience, by the lower federal judiciary: The planning v. operational test. The test will not bring certainty of result; no test will bring such certainty. But the planning v. operational test will allow adequate consideration of all relevant factors, while still preserving the basic intent and purpose of the Act—to make the government liable to those it tortiously injures.

Inc. v. United States, 753 F.2d 1151 (D.C. Cir. 1985) (the Act makes the United States liable in accord with local tort law). But *Varig* treats *Rayonier, Inc.* as leaving *Dalehite* fundamentally unchanged—rejecting it only to the extent that it indicated federal liability under the Act is limited to that of a municipal corporation or other public body. *Varig*, 467 U.S. at 813 n.10.

138. Harris & Schnepfer, *supra* note 47, at 189.

